83-756

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF WASHINGTON,
Respondent,

and

LINDA RAE BURTIS and
KRISTY BURTIS,
Statutory Parties,

v.

MERLE W. BLEVINS,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

(1) What kind of a hearing is contemplated by the due process clause as a condition by which a state may force a Defendant in a paternity case to take a blood test?

(2) Is a Defendant entitled to a full adversary hearing with the right of cross examination and the opportunity to call witnesses on his own behalf before being compelled to take a paternity blood test?

(3) Does the Fourteenth and Fourth Amendments protect the interest of a Defendant in a paternity suit?

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The petitioner respectfully prays that a Writ of Certiorari issue to review the refusal of the Supreme Court of the State of Washington to review petitioner's claim of a right to a full adversary hearing before being compelled to take a paternity blood test.

OPINION BELOW

This is a contested paternity case brought by the State of Washington under its Uniform Parentage Act, R.C.W. 26.26. In this action the State seeks to have Petitioner declared to be the natural father of Kristy Burtis (b.d. May 30, 1981) and to have child support fixed for her care. Petitioner denied that he was the natural father and denied that he had had intercourse with the mother during her conception period.

An order of the trial court compelling Petitioner to submit to a paternity blood test was appealed to the Court of Appeals, Division I, of the State of Washington. That Court denied the appeal in a Commissioner's ruling dated February 4, 1983. (Appendix 1).

On August 12, 1983, the Commissioner of the Supreme Court of the State of Wash-

ington denied a Motion of Petitioner for Discretionary Review (Appendix 2). A mandate of the Court of Appeals of the State of Washington dated October 19, 1983 mandated the case back to the trial court for further proceedings and foreclosed Petitioner from having an adversary hearing on the issue of the blood test. (Appendix 3). This petition followed.

JURISDICTION

This Court's jurisdiction is invoked under 28 USCA §1257(3).

STATUTE INVOLVED

The Uniform Parentage Act of the State of Washington (R.C.W. 26.26) provides in part as follows:

> "RCW 26.26.100 - Blood Tests. (1) The Court.....upon request of a party shall, require the ..... alleged father to submit to blood tests."

STATEMENT OF THE CASE

The prosecuting attorney for Snohomish County, Washington, representing the State of Washington and the mother of a minor child, moved the trial court for an order compelling petitioner to undergo an HLA blood test for the purpose of assisting in the establishment of whether he was the natural father of Kristy Burtis. Petitioner moved to strike the state's application on the basis that no showing had been made that the Petitioner had had intercourse with the mother during the conception period.

Written interrogatories were propounded to the mother by petitioner and were answered in an inconsistent and confusing manner as to whether petitioner had intercourse during the crucial period. Petitioner denied intercourse with the mother in a written affidavit and the

mother responded by claiming she had had intercourse with petitioner.

At a hearing before a Court Commissioner of the trial court, an order was entered compelling petitioner to submit to a blood test and finding that the State had satisfied the Parentage Act and State v. Meacham, 93 W^{2d} 735, 612 P^{2d} 795 (1980) by making out a prima facie case for ordering the test of having intercourse during the conception period.

Petitioner's request for a full adversary hearing on the issue of whether a prima facie case had been made under the Paternity Act and Meacham, supra, was denied. The Commissioner refused to allow an oral hearing and found that written interrogatories and affidavits were sufficient.

The order was affirmed by the trial court. On appeal to the Court of Appeals

for the State of Washington, the Court Commissioner dismissed the appeal on the basis that such an order was not a final and appealable one and that, even if it were final, no obvious or probable error had been shown. This dismissal was later affirmed by the Court Commissioner for the Supreme Court of the State of Washington.

REASONS FOR GRANTING THE WRIT

A hearing or opportunity to be heard is an essential element of due process. The refusal of a trial court to permit a full adversary hearing on the question of whether a state makes a prima facie case to order a blood test is a violation of the right of due process of the Fourteenth Amendment. Goldberg v. Kelly, 397 US 254, 25 L.Ed.2d 287; 16A CJS, Consti. Law, §622, p. 824; Wolff v. McDonnell, 418 US 539, 41 L.Ed.2d 935. In Wolff, this

court had the opportunity to review the question of whether certain disciplinary proceedings, in a penitentiary, comported with the Due Process clause of the Fourteenth Amendment. This court observed that:

> "The touchstone of due process is protection of the individual against arbitrary action of government."

It further observed:

> ".....the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense.....Ordinarily, the right to present evidence is basic to a fair hearing....."

In State v. Meacham, the Washington State Supreme Court had before it a paternity suit in which both Defendants (two cases were consolidated for one hearing on appeal) contended their constitutional rights were being denied. While the Court upheld the trial judges, it allowed in

dicta (at page 741) -

> "Neither of these appellants has denied sexual intercourse with the particular mother concerned at about the time conception is alleged to have occurred. Had such a denial been made, it would have been incumbent upon the court to hold a hearing to determine that issue prior to ordering submission to the blood test. The trial court should be satisfied, at least, prima facie, of the fact of sexual intercourse during the approximate time period as a condition to requiring submission to a blood test." (Emphasis added).

A statute which fails to provide for a hearing before a blood test is ordered is invalid as in contravention of the due process clause. Morrissey v. State Ballot Law Commission, 43 NE^{2d} 385, 312 Mass. 121. The Washington Uniform Parentage Act does not provide for a hearing prior to ordering a blood test and is invalid on its face since the accusation of fatherhood

holds great potential for the accused - support payments, inheritance rights, criminal sanctions for failing to pay support, and the like.

The right to a hearing, as described by the Washington State Supreme Court in Meacham must, at a minimum, include cross examination of witnesses. In Re Oliver, Mich., 33 U.S. 257, 92 L.Ed. 682. A hearing based upon affidavits and answers to written interrogatories does not meet such a minimal constitutional requirement.

In Rose v. District Court, 628 P^{2d} 662 (Mont. 1981), the court reviewed the due process requirement essential in a paternity case under the Uniform Parentage Act, where the state seeks to establish a prima facie case for ordering of a blood test. It held that the Defendant was entitled under minimal due process to a full adversary hearing before the blood test

cculd be ordered.

> "In the present case it is apparent that the statutory procedure has not been followed. What should occur under the Uniform Parentage Act is that after the action is brought to declare the paternity of the child, an informal hearing by way of a pretrial proceedings should occur... .... At the pretrial hearing, if any party refuses to testify under oath, the Court may order him to testify.....It is at the pretrial hearing that the Court may order the blood tests....." (Emphasis added).

CONCLUSIONS

Petitioner has followed state procedures in raising a federal due process question before both the trial and appellate courts. This question is not a temporary or interlocutory order. It is final and substantial. This court can, and will, assert its jurisdiction where the state's highest court merely evades

the question. Rodgers v. Alabama, 192 U.S. 226.

A decree of the highest state court on a federal issue is final for the purposes of this Court's review. This is true even if there are further proceedings, or even entire trials, where the federal issue is conclusive or the outcome is preordained. Cox Broadcasting Corp. v. Cohn, Ga., 1975, 420 U.S. 469.

Respectfully submitted,

Robert H. Stevenson

David W. Harris

Attorneys for Petitioner

APPENDIX 1

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, and LINDA RAE BURTIS and KRISTY BURTIS, Statutory Parties, v. MERLE W. BLEVINS, Appellant.	NO. 11995-8-I COMMISSIONER'S RULING DISMISSING APPEAL

On January 11, 1983, a commissioner of this court issued a ruling continuing the hearing on the court's motion to dismiss the above-entitled appeal as from a non-appealable order to January 28, 1983. On January 18, 1983, appellant filed his memorandum in opposition to the motion.

A commissioner heard oral argument and has reviewed the records and files in this court, and has determined that an order compelling a blood test in a paternity proceeding

is not a final, appealable order. Further, even if the notice of appeal were deemed a notice for discretionary review pursuant to RAP 5.1(c), counsel for Merle W. Blevins failed to demonstrate that the trial court committed obvious or probable error pursuant to RAP 2.3(b). Now, therefore, it is hereby

ORDERED that the above-entitled appeal is dismissed.

Done this 4th day of February, 1983.

Joseph A. Thibodeau
Court Commissioner

APPENDIX 2

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, Respondent, and LINDA RAE BURTIS and KRISTY BURTIS, Statutory Parties, v. MERLE W. BLEVINS, Petitioner.	NO. 49620-2 RULING DENYING MOTION FOR DISCRETIONARY REVIEW

The Snohomish County Superior Court ordered petitioner Merle Blevins to submit to a blood test in this action to determine the paternity of Kristy Burtis. Mr. Blevins filed a notice of appeal from that order. Division One of the Court of Appeals found the order nonappealable under RAP 2.2 and not warranting discretionary review under RAP 2.3. It therefore dismissed the appeal. Mr. Blevins now moves for discretionary review of the dismissal by this court.

The Court of Appeals order dismissing the appeal was an interlocutory decision. RAP 12.3. Thus, as the State correctly observes in its response to the instant motion, this court will grant discretionary review only if one of the criteria of RAP 13.5(b) is satisfied. Mr. Blevins' motion, however, fails to argue his case with reference to that rule. Nor, indeed, does he discuss why the trial court's order ought to have been considered appealable under RAP 2.2 or appropriate for discretionary review under RAP 2.3. In other words, Mr. Blevins' motion ignores the procedural questions which should be central to his request for review.

On these critical procedural questions, I first conclude that the Court of Appeals was correct in finding the trial court's order not appealable under RAP 2.2. The order simply does not fit into any of the

subsections of that rule. I also conclude that the Court of Appeals did not err in denying discretionary review. This is because I do not believe that on the merits the trial court committed obvious or probable error, or departed from the accepted and usual course of judicial proceedings. RAP 2.3(b).

Mr. Blevins' contention seems to be that a trial court must hold a full evidentiary hearing before ordering a blood test, at least where the fact of intercourse is denied by the putative father. The authorities which he cites do not support this contention. In particular, State v. Meacham, 93 Wn.2d 735, 612 P.2d 795 (1980) indicates only that in such a situation some sort of hearing should be held, and that the trial judge "should be satisfied, at least prima facie, of the fact of sexual intercourse....." 93 Wn2d at 741.

The hearing in this case, at which the trial court considered affidavits and interrogatory answers and heard argument from counsel, probably was sufficient to meet this requirement. I further am not persuaded that due process requires a full evidentiary hearing before a blood test may be ordered.

In short, Mr. Blevins has failed to demonstrate why further review by this court is necessary under the standards of RAP 13.5(b). The motion for discretionary review is therefore denied.

DATED at Olympia, Washington, this 12th day of August, 1983.

Geoffrey Cooke
Commissioner

APPENDIX 3

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, and LINDA RAE BURTIS and KRISTY BURTIS, Statutory Parties, v. MERLE W. BLEVINS, Appellant.	NO. 11995-8-I MANDATE Snohomish County No. 81-5-00283-7

The State of Washington to: The Superior Court of the State of Washington in and for Snohomish County:

This is to certify that the Court of Appeals of the State of Washington, Division I, considered and granted a motion to dismiss the appeal in the above-entitled case on February 4, 1983. Accordingly, this cause is mandated to the Superior Court from which this appeal was taken for further proceedings in accordance with the determin-

ation of that court.

Mandate after motion for dismissal granted.

The motion to modify the commissioner's ruling was denied by an order dated March 8, 1983; the motion for discretionary review filed in the Supreme Court was denied by a ruling dated August 12, 1983.

cc: Hon. Seth Dawson
Snohomish County Prosecuting Atty.
Ms. Patricia Schlosser, Deputy
Ms. Jeanne A. Pascall, Deputy
Mr.Robert H. Stevenson

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 19th day of October, 1983.

Richard D. Taylor
Clerk of the Court of Appeals, State of Washington, Division I